Neutral Citation Number: [2022] EWHC 129 (Ch)

Case No: PT-2020-000318

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**PROPERTY, TRUSTS AND PROBATE LIST (ChD)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 January 2022

**Before**:

**DEPUTY MASTER BRIGHTWELL**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **COLIN JOHNSTON** | **Claimant** |
| **- and -** | |
| **NATALIE ELSIE WACKETT (in her capacity as executrix of the estate of Lord Sidney Albert Johnston deceased)** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**David Giles** (instructed by **Brightstone Law LLP**) for the Claimant
**Romie Tager QC and Maxwell Myers** (instructed by **Branch Austin LLP**) for the Defendant

Hearing dates: 11 and 12 November 2021

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

Crown Copyright ©

**Covid-19 Protocol:** This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

**Deputy Master Brightwell:**

1. This Part 8 claim relates to the administration of the estate of the late Sidney Albert Johnston, who died on 27 March 2017.

2. In earlier proceedings brought under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") the claimant, Colin Johnston, sought an order for reasonable financial provision from the estate of his late father, Sidney Johnston. Following a trial before Mr Edwin Johnson QC (now Edwin Johnson J) sitting as a Deputy Judge, the claimant was awarded a lump sum of £125,000 from his father's estate, together with an order for costs, including for payment of £50,000 on account of those costs. The Deputy Judge handed down his judgment on 11 December 2019, following a trial between 5 and 12 November 2019 ("the 2019 Judgment": [2019] EWHC 3353 (Ch)).

3. The defendant, Natalie Wackett, is Sidney Johnston's granddaughter, being the daughter of Colin's late brother, Gary Johnston. She is the executrix and sole beneficiary of Sidney's estate, according to his last will dated 10 January 2017, to which probate was granted on 28 February 2018.

4. Like the Deputy Judge in the 2019 Judgment, I will refer to the parties and other family members by their first names, also intending no discourtesy in doing so.

5. As at the 2019 trial, Colin was represented by Mr Giles, and Natalie by Mr Tager QC and Mr Myers. I have also had the benefit of a note of the oral evidence prepared by Mr Myers, for which I am grateful. As will be apparent, the evidence was of very much narrower scope than that in issue during the 2019 trial.

**The issue**

6. The question that now arises is whether the Natalie in her capacity as personal representative can, in the administration of Sidney's estate, deduct or net off from the claimant's 1975 Act award the amount of an unsatisfied costs order dating from 1998 plus interest (in a total sum said to be £116,055.75), under the rule in *Cherry v Boultbee* (1839) 4 My & C 442. The existence of the costs order, and the reasons why it was unenforced, were considered at the 2019 trial but Natalie's evidence is that she discovered documentation appearing to quantify the liability after a search conducted by her after the 2019 Judgment was handed down.

7. Colin has brought this claim in substance if not in form under CPR Part 64.2(a), asking the court to determine a question arising in the administration of Sidney's estate, namely whether Natalie was entitled to net off the sum of

£116,055.75, leaving him with around £8,900 of the £125,000 awarded to him by the Deputy Judge.

8. The rule in *Cherry v Boultbee* was explained by Lord Walker of Gestingthorpe JSC this way in *In re Kaupthing Singer & Friedlander Ltd (in administration) (No.2)* [2012] 1 AC 804 at [8]:

> "The expression 'the rule in *Cherry v Boultbee*' suggests a technical rule of some complexity. Any such impression would be misleading. It is basically a simple technique of netting-off reciprocal monetary obligations, even where there is no room for legal set-off, developed and used by masters in the Court of Chancery in giving directions for the administration of the estates of deceased persons. Complication arises only in a situation of insolvency, where the equitable rule produces a different outcome from that produced by statutory set-off."

9. In the context of the administration of an estate, Cozens-Hardy MR described the effect of the rule thus in *Turner v Turner* [1911] 1 Ch 716 at 719:

> "You, the debtor, have in your hands part of the assets of the testator and you cannot claim any part of the assets of the testator, out of which of course your legacy must be paid, without bringing into the estate that portion which is now in your pocket; or, in other words, your legacy must be treated as paid pro tanto out of the assets of the testator which you have in your pocket."

10. When an order is made in favour of an applicant under the 1975 Act, it is deemed to have had effect for all purposes as from the deceased's death subject to provisions of the order: 1975 Act, s.19(1). It seems clear, therefore, that such a person, when a lump sum order is made, is treated as a legatee under the will and thus as a beneficiary of the estate. See *Re Jennery (deceased)* [1967] Ch 280 at 285.

11. The rule applies even where the debt was statute barred at the time of the testator's death: *In Re Akerman* [1891] 3 Ch 212 at 221. An order for costs does not become wholly unenforceable by the effect of the Limitation Act 1980. Section 24 of that Act precludes the bringing of any action upon a judgment debt after six years from the date on which it became enforceable, but this does not prevent an application (now under CPR Part 83.2(3)) to extend time for execution under a judgment: see *National Westminster Bank plc v Powney* [1991] Ch 339.

## The 2019 Judgment

12. In the 2019 Judgment, in making an award of £125,000 in Colin's favour, the Deputy Judge set out in detail his factual findings regarding Colin's circumstances, and the relevant family history. I do not seek to set all that history out again here. For the purposes of this judgment, it suffices to record that Colin and Sidney worked together for many years, but their relationship suffered a permanent rift in 1991. The 2019 Judgment records the following at [132]:

> "Taking all the evidence and submissions which I have read and heard into account, and taking all of the documentation before me into account, my principal findings as to the circumstances of Colin's departure from the Car Business and the Property Business, in February 1991, are as follows.
>
> (1) In the period prior to February 1991 there were increasing disagreements between Colin and Sidney over the direction of the Car Business, in respect of which Gary took the side of his father. The position was aggravated by the long standing problems which existed in the relationship Colin had with his parents and, in particular, with Sidney.
>
> (2) Matters came to a head in February 1991 in a heated meeting attended by Colin, Gary, and Sidney at which there were angry exchanges. The upshot of the meeting was that Sidney indicated to Colin that he could leave if he did not like what was happening. Colin, having reached the end of his toleration of the situation, took up that invitation and left.
>
> (3) The situation was not one where it could be said that Colin was responsible for his own departure. Relations had deteriorated so seriously that the only solution was for Colin, on the one side, and Sidney, on the other side, to go their own separate ways. In terms of responsibility for Colin's departure, I do not think that it can be said that Sidney was in the same position as Colin. The serious deterioration in relations which caused the final rift was, at least in substantial part, the result of the long standing problems which existed in the relationship between Colin and his parents and, in particular, between Colin and Sidney. I do not find that Colin was responsible for these long standing problems. I do find that responsibility for these long standing problems rested with Sidney. In this sense at least, Sidney was responsible for Colin's departure."

13. In the final section of the 2019 Judgment, the Deputy Judge carefully considered each of the statutory criteria in section 3 of the 1975 Act in determining, for the purposes of section 2, whether the disposition of Sidney's estate effected by his will was not such as to make reasonable financial provision for Colin's maintenance, in all the circumstances of the case.

14. When considering the size and nature of the estate, the Deputy Judge said the following at [204]:

> "The Estate is substantial. This is not a case where the applicant is competing with a beneficiary or beneficiaries for a share of a limited estate. Assuming that the Estate has a net value (after tax) of around £1.4 million, Colin's claim is for less than 10% of that net value. £125,000 [the award for which Colin, at trial, contended] is a substantial sum of money, but relative to the value of the Estate it is not that large."

15. The Deputy Judge then considered in some detail the evidence as to the conduct of the parties and Natalie's submission that, having abandoned his father and held to that decision for over 25 years, Colin should not be permitted to re-surface with a claim on the estate. The Deputy Judge concluded at [217], however, that Sidney owed a moral obligation to Colin to make provision for him out of his estate, and that this obligation remained operative as at Sidney's death, and that in terms of conduct the scales came down firmly in favour of Colin, as between Sidney and Colin. Natalie's own exemplary devotion to Sidney did not turn the scales against Colin.

16. The 2019 Judgment set out the reasons for accepting that £125,000 as a lump sum was the appropriate award, thus constituting financial provision that it was reasonable in all the circumstances of the case for Colin to receive for his maintenance. As to Colin's financial needs and financial obligations and responsibilities, the Deputy Judge at [194] described his current situation as "precarious", and then said at [201]:

> "Paragraph (a) of Section 3(1) does not define the expression foreseeable future". Looking at the facts as they are known to me at the date of trial, and bearing in mind what I am required to consider by Section 3(6), in terms of financial resources and financial needs, my assessment is as follows.
>
> (1) Even if, which I do not think is correct, the foreseeable future is limited to the next five years, it seems to me that there is a substantial risk that Colin will not have the financial resources to meet his financial needs during that period, at the end of which Colin will be 82. Looking beyond the next five years, which I regard myself as

entitled to do, this substantial risk only seems to me to increase, to the point where it seems to me to become a virtual certainty.

(2) One particular problem which seems to me to confront Colin and Joan [Colin's wife] in this context is that they do not have a secure home. They do not own the House. They do not, at least so far as I am able to assess the position, have any security of tenure in the House outside the contractual term of whatever lease Wrotham Park is prepared to grant, and that contractual security of tenure depends, in particular, upon all the relevant parties/businesses being able to pay their share of the rent payable under the relevant lease. Putting the position bluntly, if circumstances arise in which Colin and Joan are forced to vacate the House, Colin and Joan are substantially at risk of ending up homeless. For the reasons which I have explained, it seems to me that such circumstances could quite easily arise in the foreseeable future, whether one limits the foreseeable future to five years or, which I regard as correct, one takes the foreseeable future as extending beyond five years."

17. He then concisely set out his conclusion in the following terms:

"222. The claim is, as I have said, for a lump sum award of £125,000. Mr. Giles explained the thinking behind this sum in his closing submissions. Using the Duxbury Tables, the sum of £125,000 will produce an income for Colin [who was born in August 1942] of £20,000 per year for the remainder of his life. In referring to the remainder of Colin's life I mean the life expectancy of a man of 77, as estimated by the Duxbury Tables. As I have said, the Duxbury Tables are often used in cases of this kind, for the purposes of assessing the lump sum required to produce a lifetime income of a certain amount.

223. Mr. Giles put forward the figure of £20,000 per year as an income which would provide Colin with some security, in terms of his future maintenance, in particular by reference to the shortfall which will arise in respect of income and expenditure, if either Colin or Joan or both see their earning capacity impaired or lost.

224. There is no doubt that I have the power to award a lump sum payment, under paragraph (b) of Section 2(1). I have found that the Will does not make reasonable financial provision for Colin, in terms of his maintenance. The question therefore becomes whether a lump sum of £125,000, intended to produce an income of £20,000 per year, constitutes financial provision which would, in all the

circumstances of the case, be reasonable for Colin to receive for his maintenance.

225. In my judgment the answer to that question is clearly yes. For the reasons which I have already set out, I regard Colin as being in a precarious financial position. I regard Colin as being at substantial risk, in the foreseeable future, of not being able to meet the everyday expenses of his living. It is, necessarily, not possible to identify the precise sum which will be sufficient to alleviate this position and put Colin's fairly modest maintenance requirements on to a secure footing. It does seem to me that £20,000 per year, for the remainder of Colin's life expectancy, is well within what I would regard as a reasonable annual income in order to ensure, for the foreseeable future, that Colin will be able to continue to meet the everyday expenses of his living.

226. I also see no objection to using the Duxbury Tables in order to calculate the lump sum award required to achieve this income; namely £125,000.

227. I therefore conclude that a lump sum award of £125,000 constitutes financial provision which it would be reasonable in all the circumstances of the case for Colin to receive for his maintenance."

18. A matter of some significance at the 2019 trial was litigation which took place after the rift occurred between Colin and Sidney. It is in respect of the liability for costs of Colin to Sidney (and others) from this litigation that Natalie now seeks to exercise a right of net off against the lump sum award in Colin's favour. I can do no better than to set out the summary given by the Deputy Judge in the 2019 Judgment.

"86. …. In the following year, by writ issued on 17th March 1992, Colin commenced proceedings ("the 1992 Proceedings") against the Company, Sidney, Elsie, and Gary. In the Statement of Claim in those proceedings Colin alleged, in broad summary, that there had been an equal partnership or partnerships between himself, Gary, and Sidney, in respect of the Car Business and the Property Business, and that the assets of each Business were held on trust for the benefit of the partnership or partnerships.

87. A Defence and Counterclaim was served, denying that there had been any partnership, and instituting a counterclaim against Colin and Robert. The principal allegation in the Counterclaim was that Colin had been buying and selling cars on his own account, or in

Robert's name, while an employee of the Company and in breach of his contractual duties to the Company. It was also alleged that Colin had taken three cars belonging to the Company; being the Seat, the Renault, and the Audi, all of which are referred to in the correspondence I have quoted above. It was alleged that Colin had sold the Seat and Renault and retained the proceeds of sale for himself, and had retained the Audi for his own use.

88. A Reply and Defence to Counterclaim was served in response to the Defence and Counterclaim, contesting the Defence and Counterclaim. In relation to the three cars specifically mentioned in the Counterclaim, the Defence to Counterclaim admitted the sale of the Seat and the Renault, but claimed that the proceeds of sale had been used to pay the Company's workmen in the Car Business. It was alleged that the Audi had been given to Joan by the Company for her own use.

89. Further and better particulars were sought, and provided in respect of the above pleadings, but the 1992 Proceedings do not themselves appear to have progressed much beyond the pleadings. The principal reason for this appears to have been that, in 1993, Colin was granted a legal aid certificate for the pursuit of the 1992 Proceedings. The grant of this legal aid certificate was challenged by the defendants to the 1992 Proceedings (Sidney, Elsie, Gary, and the Company [Johnston & Sons Limited]) on the basis that Colin, by virtue of his means, did not qualify for legal aid and had misled the Legal Aid Board. The result was a long and complicated saga in the course of which Colin's first legal aid certificate was revoked, restored on appeal, and revoked again, while a second legal aid certificate was also granted but then discharged. The upshot of the saga was that Colin was left without legal aid.

90. On 14th October 1998 the defendants to the 1992 proceedings applied for the dismissal of Colin's claims in the 1992 Proceedings for want of prosecution. The application was successful, and Colin's claims were dismissed for want of prosecution by an order of Master Moncaster made on 19th November 1998. The defendants were given liberty to discontinue their counterclaim; being a step which the defendants would have been obliged to take in order to secure the dismissal of Colin's claims for want of prosecution. Colin was ordered to pay the costs of "the Action", which I take to mean his claims in the 1992 Proceedings.

91. Colin appealed against the dismissal of his claims, but the appeal, which was heard by Burton J., was unsuccessful. The appeal was dismissed, with costs, by an order of Burton J. made on 3rd March 1999. Colin sought permission to appeal against that order from the Court of Appeal. In cross examination Colin told me, and I accept, that by that time he had run out of money to pay legal costs (he was represented by Counsel in the appeal to Burton J.) and appeared in person on the hearing of the application for permission to appeal to the Court of Appeal. That application was unsuccessful. So it was that the 1992 Proceedings hit the buffers.

92. The defendants to the Proceedings then sought the taxation of their costs bill for the proceedings at first instance and in the appeal, in the sum of around £50,000. This resulted in a further dispute over whether and, if so, to what extent, Colin had had the protection of a legal aid certificate for any part of the 1992 Proceedings. This dispute was determined by Master Campbell, as the Costs Judge, by a decision dated 5th April 2001. The Costs Judge determined the preliminary issue in favour of the defendants, and decided that Colin was deemed never to have been an assisted person.

93. This left Colin exposed, in full, to a liability for the defendant's costs, following taxation. As I understand the position however, the defendants did not enforce payment of their costs against Colin. Mr. Tager submitted to me that it would have been Sidney who would have been the decision maker in this respect. Based on the evidence of Sidney's character which I have heard, it seems to me that Mr. Tager is right in this, and I find that it was Sidney's decision not to enforce payment of the defendants' costs against Colin.

94. The non-enforcement of the costs might well have been seen as an olive branch, but it did not have this effect. There was no further contact between Colin, on the one side, and Sidney, Gary and his family, on the other side. The rift which occurred in February 1991 remained permanent, to Gary's death and, beyond, to Sidney's death."

19. The Deputy Judge returned briefly to the theme at [133], after summarising his findings as to the cause of the rift between Colin and Sidney.

"I should repeat that the rift was permanent. I understand that Colin never spoke directly to his father again, or had any direct contact with his father. In cross examination Colin said on several occasions that it was for Sidney to make the first move. From what I have heard of Sidney's

character, it seems very likely to me that Sidney would have taken the equivalent view; namely that it was for Colin to make the first move. I say this subject to the point that the non-enforcement of the defendants' costs of the 1992 Proceedings might have been intended, and might have been seen as a first move by Sidney. Subject to this possible exception, no one made the first move."

20. Mr Tager was at pains to point out, correctly, that there was no actual finding of fact in the 2019 Judgment that Sidney intended the non-enforcement of the costs order to be an olive branch, or an attempt to initiate a reconciliation. What is clear is that the costs order was not in fact enforced against Colin, and that the Deputy Judge found (at [93]) that it was Sidney's decision not to enforce any of the defendants' costs against Colin. He did not need to make any finding as to the precise point at which this decision was made. I was taken to the note of the cross examination at the 2019 trial, where the costs of the 1992 Proceedings featured only briefly. The point Mr Tager made was that Colin did not accept in cross examination that the non-enforcement of the costs order was intended by Sidney to be an olive branch. Ultimately, I do not consider Sidney's motives in not enforcing the order to be relevant to my decision in the present claim.

21. I would also note, as Mr Giles stressed the point, that at the hearing at which the 2019 Judgment was handed down Natalie applied for, and obtained, an order postponing by three months the time by when she was required to comply with the order to pay the lump sum award. This order was sought on the basis that there were no cash in the estate from which the sum of £125,000 could immediately be paid. By an order made on 11 December 2019, Natalie was ordered to pay the sum of £125,000, plus interest at 2% per annum from that date, and £50,000 on account of costs, both sums to be paid by 11 March 2020. Again, I do not consider the fact of this application (which in light of *Re Jennery* may have been made out of an abundance of caution) to be relevant to my decision.

22. I was addressed on how the costs of the 1992 Proceedings became an issue at the 2019 trial. Claims under the 1975 Act must be commenced as a Part 8 claim. At a case management conference on 21 August 2018, Master Teverson directed that the claim would thereafter proceed under Part 7, and that the parties were to give standard disclosure by list and category by 18 September 2018.

23. The 1992 Proceedings had been raised as an issue by Natalie in her witness statement dated 23 February 2018. She said there, at paragraph 53, that "the litigation went on for several years by reason of Colin not actively prosecuting it and Colin eventually lost the claim". Neither the witness statement nor the exhibited inheritance tax form IHT400 referred to the costs

order in the 1992 Proceedings as an asset of Sidney's estate. Mr Tager told me that the issue of those costs was raised as it went to the breakdown of the parties' relationship; not because it was then considered relevant to the value of the net estate.

24. It is clear that the documents relating to the 1992 Proceedings and referred to in the 2019 Judgment were disclosed by Natalie. No documents on this issue were disclosed by Colin. I was told, without challenge but also without any supporting documents, that Colin's solicitors had complained that too much documentation had been disclosed. The last word on the subject in the documentation available at the 2019 trial appears to have been the decision of Costs Judge Campbell dated 5 April 2001, which dealt with the preliminary issue of whether Colin had the protection of a legal aid certificate. This issue arose within the detailed assessment proceedings. The only indication of the quantum of the costs claimed came in Costs Judge Campbell's decision, at [2], where he said that the bill claimed "about £50,000 for the costs of the action and the appeal".

**Post-2019 Judgment developments**

25. By a letter dated 11 March 2020, Natalie's solicitors wrote to Colin's solicitors as follows:

> "Further to the Order dated 11 December 2019 ("the Order") we have today transferred to your bank account £59,567.25. Please acknowledge safe receipt.
>
> In respect of the sum of £125,000 ordered to be paid pursuant to paragraph 1 of the Order, our client is exercising her right under the rule in *Cherry v Boultbee* (1839) 2 Keen 319; affirmed on appeal, 4 M. & Cr. 442 to set-off the outstanding costs order in the sum of £115,432.75. This amount comprises:
>
> 1. The principal sum of £36,868.02
> 2. VAT of £5,806.71; and
> 3. Interest on both of those amounts at 8% per annum from 9 November 1998 to the 11 March 2020, that amounts to £72,758.02.
>
> For your information, we attach a letter from Selwyn & Co [the solicitors who acted for the defendants in the 1992 Proceedings] dated 2 July 2002 and refer you to the Decision of Master Campbell which appears in the trial bundle at page 957, which confirm that the assessment took place and that the costs payable by your client were £36,868.02, down from

> £42,514.93 claimed, plus VAT of £5,806.71 together with statutory interest that runs under the Judgment Act rate [of 8%] from the date of the original costs order, namely 19 November 1998."

26. The 2 July 2002 letter from Martin Selwyn of Selwyn & Co which was attached referred to the sum assessed and to the question of VAT, as described above, and went on:

> "…. I have as arranged sent a copy to Colin and I will in due course be making an Application for the Final Certificate which the Court will then serve on Colin.
>
> You asked me to proceed with the preparation of a Bill for Assessment in relation to the two Hearings before Master Campbell and the Hearing before His Honour Judge Jacobs and in order for me to proceed and instruct the Costs Draftsman I will need to be put in funds in respect of their fee and to cover the Court Fee on the Application for the Assessment. Please be warned that in view of the delay in proceeding with the bill for Assessment the Master may decide that you are ultimately not entitled to all the interest from the date that the Order was finally made. As requested I look forward to receiving a cheque for £1500 to cover hopefully the costs of this aspect and I await hearing from you so that I can proceed."

27. The letter does not make clear what was said to have been sent to Colin, although I accept that it is likely to have been a copy of the schedule of costs as assessed by Costs Judge Campbell, with his note of those items allowed, disallowed or reduced (see now section 19.1 of the Senior Court Costs Office Guide 2021).

28. The reference to HHJ Jacobs is plainly intended as a reference to Jacob J, who on 30 October 2001 heard and dismissed an appeal by Colin against the decision of Costs Judge Campbell of 5 April 2001, by which he held that Colin was deemed never to have had the benefit of a legal aid certificate. In dismissing the appeal, Jacob J ordered that Colin pay the respondents' costs of the appeal to be the subject of a detailed assessment if not agreed. In a letter dated 15 February 2002, and after notice of the detailed assessment hearing in June 2002 had been given, Mr Selwyn advised Gary that a further bill for the hearings before the Costs Judge and the Court of Appeal (see the 2019 Judgment at [91]) be prepared. That appears not to have happened by the time the 2 July 2002 letter was written.

29. Because the defendants to the 1992 Proceedings had also discontinued a counterclaim in that action, they were liable under the rules then in force to pay Colin's costs of the counterclaim. A letter from Selwyn & Co to Gary

dated 20 October 1999 records that Master Moncaster had previously ordered that the defendants pay Colin's costs of the counterclaim, to be taxed if not agreed, and set-off against the costs directed to be paid by Colin. A letter from a costs draftsman, Mr S J Howcroft, to Mr Selwyn of 26 October 1999 records that Colin's bill of costs totalled £5,614.29, and attaches points of dispute to Colin's bill and also suggests that there is an error of form in Colin's Notice of Assessment. A letter dated 14 February 2002 to Mr Selwyn from Colin's solicitors in the 1992 Proceedings, Comptons, indicates that the detailed assessment of both firms' bills of costs was to take place on 25 and 26 June 2002. There is no document before me confirming whether or not the assessment of Colin's bill did in fact take place on those dates.

**The parties' evidence**

30. In his first witness statement in this claim, Colin says that he has no recollection of receiving a letter from Selwyn & Co in July 2002 in connection with an assessment of costs hearing having taken place, and that he has no recollection of receiving a final [costs] certificate following an assessment hearing. He also says that he has not seen any evidence that he owed his father any money and states that he does not have and never has had any of Sidney's money or assets. Whilst I can see as Mr Tager submitted that Colin's evidence was not forthcoming as to his involvement in the detailed assessment process in 2002 as a whole, as there was no application to cross examine him, I had no opportunity to assess him as a witness. I accept the contents of his witness statements as true.

31. Natalie, in her witness statement in this claim, says the following at paragraphs 6 and 7:

> "6. I must stress that the issues relating to the taxation and enforcement of the costs order were marginal, so far as my case in the 1975 claim was concerned. My firm understanding of my late grandparents' and father's position was that Colin had behaved dishonestly in relation to the business, had been caught, and as a result walked out; that his claims of partnership in the 1992 Proceedings were unjustified; and that it was up to Colin to take the initiative to reconcile with Sidney and the rest of our family. It was not even clear during the trial whether, after the 5th April 2001 Decision of Master Campbell (see paragraph 92 of the Judgement), the costs were taxed. I was not conscious of a particular figure determined by the Court for which Colin was liable.
>
> 7. It was only following the Order that I sought advice as to whether the Estate could seek to set-off the unpaid costs order against the Judgment Sum. In the light of the advice I received (as to which

> privilege is not waived) I carried out a thorough search for the Final Costs certificate. To my surprise I found in a box in my parents' garage (which I had not searched for the purposes of my original disclosure because I was entirely unaware that my, now sadly deceased, father had kept documents in the garage) a letter from Selwyn & Company to my late father dated 2 July 2002 … which sets out that the costs payable by Colin had been taxed down from the £42,514.93, as claimed, to £36,868.02, plus VAT of £5,806.71 together with statutory interest that ran under the Judgement Act rate from the date of the costs order, i.e. 19 November 1998."

32. At a case management conference on 1 July 2021, I gave Mr Giles permission to cross examine Natalie, limited to the issue of her knowledge, up to and including 11 December 2019, of the matters now relied on by her in support of her claimed entitlement to net off the sum payable under the costs orders made in the 1992 Proceedings against the financial award made by the Court on 11 December 2019. In the course of that cross examination, which Mr Giles completed proportionately and within the bounds directed, Natalie further explained the circumstances in which she had become aware of the 2 July 2002 letter and of other documents relating to the costs of the 1992 Proceedings, which are now in the bundle before me.

33. Natalie's oral evidence in response to questioning from Mr Giles was that she had first considered whether it would be possible to net off Colin's liability for costs in the 1992 Proceedings on 9 January 2020, i.e. some four weeks after the 2019 Judgment had been handed down at a hearing. Following a conversation with her solicitor on that date, she asked her mother whether she retained any relevant documents. Together with her husband, Natalie cleared out the loft at her parents' house on or around 20-21 January 2020. She had not previously known that there was anything relevant there, but on conducting that further search found the 2 July 2002 letter from Mr Selwyn to Gary. She has not been able to find a final costs certificate. The disclosure she gave before the 2019 trial was obtained from her grandparents' house. She had before the trial made attempts without success to obtain information about the 1992 Proceedings from the court, and elsewhere.

34. I will confirm at this point that I accept Natalie's evidence as truthful. From her oral evidence, which lasted only around an hour, I formed the same impression as the Deputy Judge, that she was an impressive witness. Natalie's evidence as to the dates on which searches were considered and made rings true, especially in view of the fact (which I accept) that she knew that the costs liability had not been paid only when Colin so indicated in cross examination at the 2019 trial. She also displayed a determination in her

responses, which mirrors the substance of her evidence and the obvious efforts to which she went in order to make out an entitlement to make a deduction from Colin's award under the 1975 Act. It was clear to me from these matters, as it was to the Deputy Judge, that Natalie feels a great deal of hostility towards Colin.

**Colin's position**

35. Colin's primary position is that no final costs certificate was ever obtained, and that in the absence of such a certificate he has no liability to Sidney's estate under Master Moncaster's order of 19 November 1998 (whether or not it is presently enforceable). On the question of a final costs certificate, Colin submits that:

   i) the court should not accept the 2 July 2002 letter as evidence of the outcome of the detailed assessment as it is hearsay and cannot be verified.

   ii) there is no liability until a final costs certificate is obtained.

   iii) the evidence as a whole, including the lack of documentary evidence post-dating the 2 July 2002 letter, suggests that the court should not find that a final costs certificate was issued.

   iv) the rule in *Cherry v Boultbee* would be capable of applying only if Colin himself had paid Selwyn & Co's invoices, for otherwise his estate would be unjustly enriched by receipt of a payment which had in fact been met by another defendant to the 1992 Proceedings.

   v) the finding of the Deputy Judge in the 2019 Judgment (at [93]), that Sidney decided not to enforce payment of the defendants' costs against Colin, should lead the court to infer that Sidney instructed Mr Selwyn not to proceed with obtaining a final costs certificate.

36. Colin's secondary position, in the event that I find that a final costs certificate was obtained, or that he was liable under the 1998 costs order in the absence of such a certificate, is that the rule in *Cherry v Boultbee* does not avail Natalie in the circumstances, particularly when she did not rely on it before the Deputy Judge at the 2019 trial. Mr Giles put forward the following principal arguments:

   i) The costs order in the 1992 Proceedings was before the Deputy Judge, and the Judgment takes it into account, effectively by not making provision for its payment when calculating the sum to which Colin should be entitled from Sidney's estate. The inventory of assets and liabilities put before the court by Natalie as executrix did not make any

reference to the costs order. This was consistent with the Deputy Judge's finding that Sidney had decided not to enforce the order.

ii) Natalie is in effect seeking to vary the 2019 Judgment by introducing (and seeking to net off) a liquidated debt owed by Colin as claimant, when this is contrary to the basis on which the claim was determined.

iii) Separately (although, on analysis, in a development of the points above) Colin claims that Natalie's case is an abuse of process, in the sense described in *Henderson v Henderson* (1843) 3 Hare 400. In other words, it is an abuse for Natalie now to raise as a line of defence in these proceedings an argument which could and should have been pursued by her before at the 2019 trial. To permit Natalie to exercise a right of net off would undermine and defeat the purpose of the Deputy Judge's order.

iv) It does not matter whether Natalie knew during the 2019 trial of the facts which she says she discovered only after the 2019 Judgment was handed down. She knew enough before and during the proceedings to put her on enquiry as to the alleged net off and, with reasonable diligence, could and should have brought forward in 2019 the points on which she now relies.

v) In any event, the rule in *Cherry v Boultbee* does not apply because of Sidney's decision not to enforce the 1998 costs order. As a result of that decision, Colin had no duty to make a contribution to the estate.

37. I should record that I discussed with Mr Giles at the hearing precisely what it was that he contended was an abuse of process. He appeared at one point to indicate that it was the exercise of the right of net off itself, which took place or purportedly took place in March 2020. Mr Giles finally suggested (upon my questioning him) that Natalie ought to have applied back to the Deputy Judge to vary his order, in order to give effect to the alleged right of net off. I still did not fully understand what process was said to have been abused at that point. As I understand Colin's position at the end of the hearing, it is that the alleged abuse of process is in now running as a defence to the present claim what could and should have been argued at the 2019 trial.

**Natalie's position**

38. Natalie invites me to infer that the defendants to the 1992 Proceedings did proceed to obtain a final costs certificate, and that it created an enforceable liability (although the present application of the rule in *Cherry v Boultbee* does not require the liability to be presently enforceable). In that regard Mr Tager relied on the following points:

i) Both parties were under a duty to give standard disclosure in advance of the 2019 trial. Colin therefore had a duty to give disclosure of documents on this issue and failed to do so. Natalie disclosed documents on the issue because it was relevant to the breakdown in the parties' relationship. The issue of whether the costs had in fact been paid arose only from Colin's answers to cross examination at the 2019 trial. It was also suggested that Colin had not in his witness statement denied the fact that a final costs certificate had been obtained. Such a certificate must be served by the court on all parties (see CPR Part 47.17(3), unchanged since 2002).

ii) It is understandable that Natalie has been unable to find any further documents given the passage of time, and the fact she herself was young when the 1992 Proceedings took place, and was not a party to them. It would have been a simple step for the defendants to the 1992 Proceedings to proceed to obtain a final costs certificate after the detailed assessment hearing in June 2002 and Mr Selwyn would have been under a duty to apply for the certificate.

iii) It does not matter whether the defendants' solicitor's fees were in fact paid by Sidney or by another defendant; any of the defendants was entitled to enforce the costs order and any obligation on the enforcing party to reimburse the defendant who was out of pocket would then be a matter as between the defendants and not a matter for Colin.

iv) Even if no final costs certificate was obtained, an enforceable liability arose on the completion of the detailed assessment hearing, and it did not depend on any further step being taken. Mr Tager drew an analogy with a judgment debt given at the end of a trial, where due to an administrative oversight, no order is subsequently sealed.

39. As to Colin's other arguments, concerning the rule in *Cherry v Boultbee* and abuse of process, Natalie contends that:

i) Because the award under the 1975 Act is treated as a legacy (see [10] above), it is as a matter of law subject to the right of net off. It is thus incorrect for Colin to suggest that Natalie has breached the order of the Deputy Judge.

ii) She was unable to raise the possibility of any set-off or net off at the 2019 trial because the costs order was not then enforceable. After six years, it could be enforced only after an application for permission to do so. In any event, Natalie did not at trial know the outcome of the detailed assessment so was in no position in fact to raise the right of

set-off. The 2 July 2002 letter provided new and significant information in that regard.

iii) The court hearing a 1975 Act claim needs to know the realisable value of the estate assets and the liabilities that fall to be discharged, and does not need to know about other liabilities which may have become statute-barred or are otherwise incapable of enforcement.

iv) The rule in *Henderson v Henderson* has no application. The rule in *Cherry v Boultbee* bites only once an award has been made under the 1975 Act, and only where the executor has full knowledge of the obligation that can be relied on to be netted off against the award. There was accordingly no need for Natalie to raise the prospect of exercising the *Cherry v Boultbee* right of net off at trial.

v) Colin's knowledge of the assessment of the costs order was, during the 2019 trial, plainly greater than that of Natalie. Accordingly, it was open to Colin to ask the Deputy Judge to raise the rule in *Cherry v Boultbee* but he did not do so.

**Was there a reciprocal monetary obligation?**

40. The first question I need to determine is whether the defendants to the 1992 Proceedings proceeded to obtain a final costs certificate after the date of Mr Selwyn's letter to Gary dated 2 July 2002. Despite searches, no copy of such a certificate, nor any relevant documentation post-dating 2 July 2002, has been found.

41. This is a question of fact, which falls to be determined on the balance of probabilities. The finding depends on the inference that can properly be drawn from those primary facts which are available to me.

42. The relevant primary facts are these:

i) An extremely thorough search, albeit one completed only after the 2019 trial had ended, has located a significant quantity of documents relating to the detailed assessment process following the discontinuance of the action and the counterclaim in the 1992 Proceedings. There is a large quantity of inter-partes correspondence in the lead-up to the detailed assessment hearing before Costs Judge Campbell in June 2002, but nothing on this subject that post-dates the 2 July 2002 letter.

ii) Colin's evidence is that he has no recollection of receiving that letter or a final costs certificate. Mr Tager submitted that Colin does not deny

that a certificate was obtained, but as mentioned above I do not consider that to be a fair summary of his evidence.

iii) Natalie's evidence was that she had made significant attempts before the 2019 trial to obtain information about the 1992 Proceedings. This shows that she was well aware that the costs orders made in that action were potentially significant. As she said in cross examination, with reference to the period before the trial (and quoting from Mr Myers' note), "*I carried out every search. .... I was trying to do everything I could to obtain further information*".

iv) No documentation has been found which suggests that attempts were made to determine the costs of the detailed assessment proceedings in 2002, or of the hearings before the Court of Appeal and before Jacob J. Mr Selwyn advised both earlier in 2002 and on 2 July 2002 that steps be taken in this regard.

v) Sidney (i.e. and not the other defendants to the 1992 Proceedings) decided not to enforce the 1998 costs order. As I have noted above, the Deputy Judge made a finding to this effect although he was not asked, and therefore had no need, to make a finding as to the date on which this decision was taken.

43. I find, in light of these facts, that no final costs certificate was obtained.

i) I have no doubt that Natalie has left no stone unturned in her attempt to find the final costs certificate.

ii) If a final costs certificate had been obtained, it would have been a key document, and would likely have been kept with at least one set of the other documents relevant to the costs of the 1992 Proceedings. I consider it to be more likely not that if it had been retained, it would have survived with the other papers which survived and would have been found.

iii) Colin's own lack of recollection is not as weighty a factor but, as Mr Tager reminds me, if a final costs certificate had been issued, it would have been served on Colin by the court.

iv) A final costs certificate is not issued until all relevant court fees have been paid. The 2 July 2002 letter does not indicate whether further fees were payable. Mr Selwyn's letter also suggested that further costs needed to be spent in order to prepare bills for other parts of the 1992 Proceedings. His advice to proceed with such other bills had already not been pursued. The evidence thus suggests that a reluctance on the

part of the defendants to spend further money on this issue had already been evinced.

44. Set against these factors is the possibility that what Mr Tager calls the simple step of filing the corrected bill of costs would have been taken after the defendants had incurred the costs of preparing a bill of costs and attending a 2-day assessment hearing. I agree that it should have been a straightforward step, but the points I have set out in the paragraph above seem to me to carry greater weight. I find in the light of the documentation that has been produced that it is more likely than not that Sidney's decision that the costs order would not be enforced was made by no later than the time of Gary's receipt of the 2 July 2002 letter, such that Mr Selwyn never applied for a final costs certificate, or took any other steps to procure an assessment of the other costs to which the defendants to the 1992 Proceedings were entitled.

45. The next question to be determined is whether, despite the absence of a final costs certificate, there is in any event an existing monetary obligation (whether or not presently enforceable) to pay the sum assessed by Costs Judge Campbell. The relevant provision in force in 2002 was CPR Part 47.16 (now replicated in rule 47.17). This provides:

> "(1) In this rule a completed bill means a bill calculated to show the amount due following the detailed assessment of the costs.
> (2) The period for filing the completed bill is 14 days after the end of the detailed assessment hearing.
> (3) When a completed bill is filed the court will issue a final costs certificate and serve it on the parties to the detailed assessment proceedings.
> (4) Paragraph (3) is subject to any order made by the court that a certificate is not to be issued until other costs have been paid.
> (5) A final costs certificate will include an order to pay the costs to which it relates, unless the court orders otherwise."

46. The notes in the *White Book* (2002 edn) indicate at 47.16.1 that "the time for payment, in accordance with r.44.8, is within 14 days of the date of the certificate*"*. The court may, however, when issuing a final costs certificate specify a different time for payment, under rule 44.8. (The relevant rule is now rule 44.7.) Former rule 47.16(5) also provided in terms (as does now the current rule 47.17(5)) that the court had a discretion when making a final costs certificate not to include an order to pay the costs.

47. Further provision was made in the Costs Practice Direction, as in force in 2002, at section 42:

"42.1 At the detailed assessment hearing the court will indicate any disallowance or reduction in the sums claimed in the bill of costs by making an appropriate note on the bill.

42.2 The receiving party must, in order to complete the bill after the detailed assessment hearing make clear the correct figures agreed or allowed in respect of each item and must re-calculate the summary of the bill appropriately.

42.3 The completed bill of costs must be filed with the court no later than 14 days after the detailed assessment hearing.

42.4 At the same time as filing the completed bill of costs, the party whose bill it is must also produce receipted fee notes and receipted accounts in respect of all disbursements except those covered by a certificate in Precedent F(5) in the Schedule of Costs Precedents annexed to this Practice Direction.

42.5 No final costs certificate will be issued until all relevant court fees payable on the assessment of costs have been paid.

42.6 If the receiving party fails to file a completed bill in accordance with rule 47.16 the paying party may make an application under Part 23 (General Rules about Applications for Court Orders) seeking an appropriate order under rule 3.1 (The court's general powers of management).

42.7 A final costs certificate will show:

(a) the amount of any costs which have been agreed between the parties or which have been allowed on detailed assessment;

(b) where applicable the amount agreed or allowed in respect of VAT on the costs agreed or allowed.

This provision is subject to any contrary provision made by the statutory provisions relating to costs payable out of the Community Legal Service Fund.

42.8 A final costs certificate will include disbursements in respect of the fees of counsel only if receipted fee notes or accounts in respect of those disbursements have been produced to the court and only to the extent indicated by those receipts."

48. *Cook on Costs* (2021 edn) says at 28.75 that, in many cases, once the figure payable as determined at a detailed assessment hearing has been agreed between the parties it is paid by one to the other and no further step is required. The text then indicates, at 28.76, that most receiving parties do not obtain a final costs certificate after a detailed assessment. It also says (at 28.75) that, "if the receiving party wishes to be in a position to enforce the costs as assessed, he needs a final costs certificate which is the quantified order for costs".

49. Even though most paying parties may in practice pay without the need for a final costs certificate to be obtained, I do not consider that the paying party comes under an obligation to pay the receiving party the sum assessed as payable by a costs judge at a detailed assessment until both a final costs certificate has been issued and the time and date for payment stipulated in the certificate has passed. CPR Part 47.16(5) (as in force in 2002) made plain that when a request for a final costs certificate is made, the court has a discretion not to make an order for payment. Furthermore, the court has discretion when to order payment. The default date is 14 days from the date of the certificate, but the court can specify another date: in 2002, see CPR Part 44.8(1) (now rule 44.7(1)). Whilst a judgment takes effect as soon as it is pronounced in court, where a detailed assessment of costs is concerned that judgment does not itself comprise an order for payment of those costs. The position is thus not the same as where an order for payment of a money sum is made in court but, by oversight, is not sealed; there the date for payment will already have been determined, the default date in CPR Part 44.7 applying only to orders for the payment of costs.

50. One has only to look to the facts of the present case for the sort of circumstances where the court may when issuing a final costs certificate order a different date for payment, or may decline to make an immediate order for payment at all. It is to be remembered that Master Moncaster had on 19 November 1998 ordered that Colin's costs of the counterclaim in the 1992 Proceedings be set-off against the defendants' costs of the action. There would have been a good reason not to issue a final costs certificate in relation to one bill of costs until the amount of that set-off could be established. It is unclear whether Costs Judge Campbell did or did not assess Colin's own bill in June 2002, but the correspondence from the time suggests that he may well have done so. This correspondence post-dated the decision that Colin had no protection as a publicly funded party and no reason was suggested to me as to why that decision will have affected the set-off directed by Master Moncaster (and I do not see why only the Legal Services Commission could have benefited). It is tolerably clear that the calculations in the 2 July 2002 letter do not give credit for this set-off.

51. Mr Tager contends nonetheless that the law recognises the obligation of the paying party to have crystallised in some real sense at the completion of the detailed assessment hearing, such that any failure to obtain a final costs certificate does not prevent the exercise by the receiving party's personal representative of the right to net off the sum payable under the rule in *Cherry v Boultbee*, even if the assessed sum was never otherwise enforceable.

52. This argument requires some consideration of the rationale behind the rule of equity. Lord Walker's formulation of the rule makes clear that there must be

a "reciprocal monetary obligation", even where there is no legal set-off: see *Kaupthing Singer & Friedlander Ltd* at [8]. Legal set-off requires, among other things, that the relevant sums are due and payable. I do not believe that in any of the authorities cited to me concerning *Cherry v Boultbee* in the context of the administration of estates the question has arisen whether an unliquidated debt or a debt which has not yet become enforceable may be netted off against an entitlement under the estate. That is hardly surprising, as in those cases the debtor has necessarily died.

53. The rule applies beyond the administration of estates. As Lord Cottenham LC said in *Cherry v Boultbee* itself, at 447, it is not a right of set-off but a right to pay out of a fund in hand. In *Kaupthing Singer & Friedlander Ltd*, Lord Walker cited at [18] the decision of Swinfen Eady J in *In re Rhodesia Goldfields Ltd* [1910] 1 Ch 239. At 246, he said this:

> "Various cases on the subject of set-off were referred to in order to shew that an unliquidated demand cannot be set-off against a liquidated debt, or a debt not due against one that is due; but this rule is of much wider application than the doctrine of set-off. In my judgment the rule is of general application that where an estate is being administered by the Court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund. It is immaterial whether the amount is actually ascertained or not. If it is not actually ascertained it must be ascertained in order that the rights of the parties may be adjusted, and it would be a strange travesty of equity to hold that in distributing the fund Partridge was entitled to be paid at once all that was due to him out of the company's money, and subsequently to find, after it had been established that he owed money to the fund, that the amount could not be recovered from him."

54. As Lord Walker explains in *Kaupthing Singer & Friedlander Ltd* at [18], *In re Rhodesia Goldfields Ltd* was a case where a director of a company in liquidation faced a misfeasance claim that had not yet been resolved. As it would be a travesty of equity for the director to be paid out when there may in the future be a judgment against the director requiring him to contribute to the fund, payment to him was deferred until the claim against him had been resolved.

55. Similar reasoning can be seen to explain the order made in *In re Akerman* [1891] 3 Ch 212. There, three of the deceased testator's sons were among the residuary beneficiaries of his will, but the testator had in his lifetime advanced various sums to those sons and IOUs from the sons were found to have been in their father's possession, albeit dated more than six years before his death. Kekewich J held that the Limitation Act 1623 did not itself prevent

a netting off under the rule in *Cherry v Boultbee*, this being the proposition for which the case is generally cited. He was, however, not satisfied on the evidence whether the debts were otherwise enforceable and, like Swinfen Eady J in *In re Rhodesia Goldfields Ltd*, held that the three sons' entitlement to residue should not be paid out until that question was determined, saying at 221:

> "But there is some evidence to shew that the testator did not intend to enforce these documents. I have attended to that evidence, and I see the weight of it, and I think it deserves further consideration. I think that seeing that these documents were retained by the testator, and that if it had been intended that there should be a release of the debts, nothing would have been easier than to give them up, it would be unsafe to say without further inquiry whether or not they are enforceable debts. I think on the whole it will be better for me not to comment on the evidence put in on behalf of the beneficiaries. All I hold is, that on the present evidence there are not sufficient materials before me to justify me in arriving at a conclusion."

56. What these cases show is that, questions of limitation aside, if it appears that a legatee may have a monetary obligation to an estate, whether or not presently liquidated or enforceable, then the executrix may withhold payment of the legacy until the question whether the reciprocal monetary obligation subsisted at the date of death has been determined. *In re Rhodesia Goldfields Ltd* would suggest that the claim of the estate does not need to have been liquidated at the date of death. But it must be a 'monetary obligation'. If upon inquiry it transpires that no such obligation has ever come into existence, then it will follow that there is nothing to net off from the legacy before payment of it to the legatee in satisfaction of his legacy. It follows from my determination above at [49]–[50] that this is the position in relation to Colin's liability to Sidney pursuant to the costs order made in favour of the defendants to the 1992 Proceedings.

57. I should stress, however, that what is required for the application of the right to net off is a reciprocal monetary obligation, i.e. an obligation by the legatee to pay a sum to the estate. I see no warrant for the imposition of a requirement that the consideration for, or which led to, the legatee's obligation must have been provided by the estate. Had the question in the event arisen, I would not have been minded to accept Mr Giles' argument that it was incumbent on Natalie to establish that Sidney alone had paid the legal costs which formed the basis of the costs order made in the 1992 Proceedings.

**The effect of the Inheritance (Provision for Family and Dependants) Act 1975**

58. In case I am wrong in my conclusion thus far, I will go on to discuss the interaction between the rule in *Cherry v Boultbee* and the effect of a claim brought under the 1975 Act. Again unsurprisingly, this does not appear to be the subject of reported authority. Mr Giles submits, independently of the points I have decided above (including that of whether the defendants to the 1992 Proceedings ever obtained a final costs certificate), that the rule does not apply to the award of a successful claimant under the 1975 Act. He submits that this is so either generally, or in the circumstances of this case where the Deputy Judge found that Sidney did not intend to enforce the costs order made in the 1992 Proceedings.

59. When one considers the statutory scheme, together with the procedural code, applicable to claims under the 1975 Act, it can be seen that the very issue with which the rule in *Cherry v Boultbee* is concerned is intended to be resolved within proceedings brought under the 1975 Act. That issue (which is narrower than the question raised by section 3 of the 1975 Act, but answered as part of it) is of course that of whether the claimant should be required to satisfy any liability owed to the estate, whether or not presently enforceable, before being entitled to receive a legacy. The wide discretion given to the court is in contrast to the inflexible nature of the right of net off. I have already set out above that the entitlement of a successful claimant under the 1975 Act to a lump sum award is treated as a legacy.

60. When determining a claim under the 1975 Act, the court considers among other factors the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future, the size and nature of the net estate of the deceased and any other matter which in the circumstances of the case the court may consider relevant (see section 3(1)(a), (e) and (f) of the 1975 Act). In particular, the written evidence filed by a personal representative in 1975 Act proceedings must give full details of the value of the deceased's net estate, together with any facts which might affect the exercise of the court's powers under the Act: see CPR Part 57.16(5) and Practice Direction 57A paragraph 16(1), (4).

61. The 1975 Act claim brought by Colin was case managed as a Part 7 claim, which is not the normal procedural form as such claims routinely proceed to a final hearing as a Part 8 claim. Accordingly, orders for disclosure (now extended disclosure pursuant to CPR Practice Direction 51U) are not routinely made, although they may be made in a Part 8 claim. Whether or not they are, the assets and liabilities of the estate and, indeed, the financial resources and liabilities of the claimant, are of central importance and evidence must be given of them even though the defendants may (as did Natalie at the 2019 trial) quite properly adduce no evidence of their own

financial position on the footing that they do not wish the court to take it into account.

62. It is thus incumbent on the parties to put before the court such information as is available to them concerning the liabilities of the claimant, including the claimant's liabilities owed to the deceased. That is what happened here; Natalie as executrix placed before the court the documents known to her about the costs orders made in the 1992 Proceedings, and the Deputy Judge took them into account in making his decision. Mr Tager sought to persuade me that Colin was responsible for the full picture regarding the costs orders not being before the Deputy Judge, Colin knowing more about the position regarding them than Natalie. He pointed out, for instance, that Colin had not revealed whether or not he was represented at the detailed assessment hearing in June 2002. It would, however, not be appropriate for me to criticise Colin for his own disclosure before the 2019 trial when he was not cross examined in the present proceedings on statements in his first witness statement in this claim that he had no recollection of receiving the 2 July 2002 letter or a final costs certificate. It is also in any event unrealistic to suggest that a 1975 Act claimant ought to be required to raise the prospect of a personal representative electing to exercise a right of net off when the representative does not herself do so despite knowing of the existence of the obligation.

63. It is clear to me on a reading of the 2019 Judgment that the Deputy Judge was well cognisant of the costs order made in the 1992 Proceedings, that it had proceeded to detailed assessment, and that it had not been enforced by the defendants to that action. It is also entirely clear that the assessment made by the Deputy Judge as to what financial provision was required by Colin for his maintenance was implicitly carried out on the basis that the costs order was not now going to be enforced, so no provision was made for it when calculating the sum Colin should receive by reference to the Duxbury Tables. Mr Tager accepted quite candidly at the very start of his oral submissions that, if the Deputy Judge had known that a right of net off was to be exercised, he would have taken it into account.

64. It is thus implicit in the 2019 Judgment that Colin will have no obligation to contribute to the estate before being entitled to receive his award. To suggest in those circumstances, applying the test as set out by Swinfen Eady J, that it would be a travesty of equity if Colin was not now required to make such a contribution with the effect of essentially destroying his award would, in my judgment, be to turn equity on its head.

65. In other words, the 2019 Judgment is an exemplification of the fact that the court in determining a 1975 Act claim takes account of the assets owed to the estate by the claimant, and indeed by anyone else. The basis of the rule in

*Cherry v Boultbee* is the maxim that he or she who comes to equity must do equity (see the report of *Cherry v Boultbee* itself, where counsel for the appellant explained it thus). I see no reason why equity would require the successful claimant in a 1975 Act claim to pay back to the estate the very money which the court has already determined was reasonably required for their maintenance. I consider this would be inconsistent with the statutory scheme of the 1975 Act. Furthermore, that successful claimant in receiving payment of their award in the due administration of the estate is not coming to equity, but rather is recovering what a court has already determined is reasonably required as financial provision.

66. There can be no sensible doubt that a testator could, by making express in his will, prevent the application of the rule in *Cherry v Boultbee* by providing that a legatee is not required to repay a debt to the estate before receiving her legacy, just as he could expressly release a debt before his death (as discussed by Kekewich J in *In re Akerman*). To similar effect, a statutory scheme that takes all matters into account and produces an award which the successful claimant should receive necessarily produces a net sum which takes into account any liabilities or other obligations owed by the clamant to the estate. If the court considers that the size of a claimant's award should reflect a liability owed by the claimant to the estate, its discretion under the 1975 Act is amply wide enough to produce an award that does this. Further, the court has power under the 1975 Act to direct a claimant who holds property of the estate to make payment or to transfer property in order that the order operates fairly as beneficiaries: see section 2(4)(a). Accordingly, I do not consider that there is room for an equitable right of self help to subsist after judgment has been given in a 1975 Act claim.

67. Another way of putting the point is to say that the deemed legacy constituted by the award under the 1975 Act is not treated by equity in the same way as an actual legacy left in a will. This is quite consistent with section 2(3A) of the 1975 Act (to which I was not referred during the hearing), which provides that, "In assessing for the purposes of an order under this section the extent (if any) to which the net estate is reduced by any debts or liabilities (including any inheritance tax paid or payable out of the estate), the court may assume that the order has already been made". While aimed at the assessment of the value of liabilities and not assets, this subsection makes clear that where the court establishes the net position after the award is made in order to ensure fairness to other beneficiaries (which it did not have to do at the 2019 trial because there were no competing claimants or beneficiaries to take into account) it must assess the value of the remaining net estate. It can do so only on the basis that any sums payable to the estate, whether by the claimant or others, are taken into account as well as any debts and liabilities of the estate.

68. My conclusion in this regard is not dependent on the facts or circumstances of this particular case or on the terms of the 2019 Judgment although, as I have said, I consider that they exemplify the point that the court in a 1975 Act claim takes account of obligations to the deceased in reaching its award. The discovery by Natalie of the 2 July 2002 letter at her parents' house in January 2020 (and I accept that is when it was found) did not reveal any information that undermines the basis on which the 2019 Judgment was given.

69. I do not comment on the case where a claimant in a 1975 Act claim dishonestly withholds relevant information from the court, which as I have said above I do not consider to be this case. In such a case, the remedies available to a defendant would be within the 1975 Act proceedings themselves.

## Other arguments

70. My conclusions above dispose of the claim. Mr Giles also asked me to find, in the alternative, that Natalie's defence of this claim was an abuse of the process of the court as her argument to be entitled to net off the amount of the costs liability in the 1992 Proceedings is one which should have been raised by her before the Deputy Judge if it was to be raised at all (relying on *Johnson v Gore Wood & Co*) [2002] 2 AC 1 at 31, Lord Bingham of Cornhill).

71. As explained in the previous section, and subject to the prior question whether a relevant monetary obligation subsists, I consider that the correct perspective from which to consider the costs of the 1992 Proceedings is that of whether there is scope for the rule in *Cherry v Boultbee* to apply at all given the process of the court that has been invoked in the prior 1975 Act proceedings. The decision I have reached as to the scope of the rule does not depend on there being any abuse of process.

72. Mr Giles, as a fallback argument, also sought to persuade me that Limitation Act 1980, section 24(2) prevented the netting off of interest after six years from the date of the costs order in the 1992 Proceedings. As this point does not arise in light of my decision above, I prefer not to express a view on it.

## Conclusion

73. I find, despite the tenacious and perspicuous submissions made by Mr Tager on Natalie's behalf, that Colin is entitled to a declaration that his 1975 Act award is payable without deduction or net off.